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IN THE SUPREME COURT OF THE UNITED STATES JOHN T. FEY, Clerk

OCTOBER TERM, 1957

No. 158

MILDA HOPKINS ASHDOWN,

Petitioner,

vs.

STATE OF UTAH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF UTAH

BRIEF FOR PETITIONER

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Supreme Court of the State of Utah following petitioner's appeal from a conviction of murder in the first degree is reported at 5 Utah 2d, 59, 296 P. 2d, 726, and appears at R. 153. Utah Supreme Court's denial of Petition for Rehearing appears at R. 161.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S. C.A. Section 1257 (3). The judgment of the Supreme Court of Utah was entered on April 30, 1956 (R. 153), and a petition for rehearing was denied on October 1, 1956 (R. 161).

The petition for writ of certiorari was filed on December 17, 1956. A brief in opposition was filed by respondent and certiorari was allowed on June 3, 1957 (R. 162).

Constitutional Provisions and Statutes Involved

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides, in pertinent part:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law. ..."

2. Article 1, Section 7, of the Constitution of the State of Utah, which provides:

"(Due Process of Law) No person shall be deprived of life, liberty or property, without due process of law."

3. The Self Incrimination and Due Process Clause of the Fifth Amendment to the United States Constitution which provides in pertinent part:

"... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; ..."

4. Article 1, Section 12, of the Constitution of the State of Utah, provides in pertinent part:

"... The accused shall not be compelled to give evidence against himself; ..."

Questions Presented

1. Whether petitioner, a defendant in a state capital case, was denied due process under the Fourteenth Amendment of the United States Constitution:

(a) Where petitioner was taken in for questioning while in an emotional and irrational state, immediately after the funeral services of her deceased husband, and was subjected to a series of constant interrogation by the sheriff and his deputies and the district attorney for a period of approximately 5½ hours, during which time petitioner did not have food or rest, was not properly advised of her constitutional rights, was denied her request for counsel, and her father and uncle were barred from the room in which she was being questioned, although they requested admittance, and their request for legal counsel for her was denied and they were told she had an attorney who would represent her, when in truth and in fact such attorney was the district attorney who was not representing petitioner, but the State of Utah.

(b) Where the admissions made by petitioner during such interrogation were obtained by coercion, and were not voluntary.

2. Whether the admission of petitioner's oral confession constitutes a denial of due process under the Fourteenth Amendment to the United States Constitution, and of the guarantees against self incrimination and due process as guaranteed under the Fifth Amendment to the United States Constitution.

3. Whether petitioner was denied due process because the jury under the court's instruction #6, were asked to pass upon the weight and credibility to be given the testimony concerning such oral admissions, upon their consideration of all of the circumstances relating thereto, when the testimony of four of the witnesses in relation thereto was not given in the presence of the jury.

Statement

Petitioner was first brought to trial on August 22, 1955, on an information charging her with murder in the first degree committed by her at Cedar City, Iron County, Utah, on the 5th day of July, 1955, upon the person of Ray Ashdown (R. 1).

A trial was had on August 22, 1955, before a jury in Iron County, Utah. Counsel for petitioner objected to the admission of testimony relating to the oral admissions and confessions made by petitioner during interrogation prior to trial on the grounds they were obtained in violation of the constitutional rights of the defendant (R. 88), but the trial court ruled adversely and admitted such testimony of the officers as to such admissions (R. 112). No other evidence of defendant's guilt was presented. The case went to the jury on August 25, 1955, and the jury after deliberating some 19 hours returned a verdict of guilty with recommendation of life imprisonment (R. 139). The petitioner was thereafter sentenced to imprisonment in the Utah State Prison for life (R. 140).

Petitioner appealed from her conviction to the Supreme Court of the State of Utah, and the Supreme Court of the State of Utah affirmed the judgment of conviction on April 30, 1956 (R. 153), and denied a petition for rehearing on October 1, 1956 (R. 161).

On December 17, 1956, petitioner filed in this Court her petition for a writ of certiorari and a motion for leave to proceed in forma pauperis. The petition and motion were granted on June 3, 1957 (R. 162).

The petitioner was the wife of Ray Ashdown. They lived at Cedar City, Utah. On the morning of July 5, 1955, Dr. R. G. Williams was called to the Ashdown residence by

Mrs. Ashdown to attend her husband (R. 18). When the Doctor arrived Mr. Ashdown was having a generalized convulsive seizure and death seemed to be imminent. He told the Doctor he had drank some lemon juice about a half hour before, then he took another convulsion and died (R. 19).

Analysis of the contents of the stomach of Mr. Ashdown by the State Chemist revealed that the same contained strychnine and the cause of his death was attributed to strychnine poisoning (R. 36). There was a bottle of lemon juice found in the refrigerator of the Ashdown home but it did not contain any strychnine (R. 35), and nowhere in the home or premises was any strychnine found (R. 52).

On the 9th of July, 1955, a funeral was held for the deceased, and at the cemetery after the burial the sheriff of Iron County, Arthur Nelson, asked Mrs. Ashdown's son-in-law to bring Mrs. Ashdown to the City and County Building for a talk (R. 55). The defendant and her sister came to the Sheriff's Office. There were present Sheriff Nelson and Deputies Arch Benson and Chuck Wells. The ladies complained about the heat and were served a glass of lemonade (R. 56). The Sheriff then asked if they could talk to the defendant alone in the Courtroom (R. 56). They went into the Courtroom where in addition to the Sheriff and his Deputies, the District Attorney, Patrick H. Fenton, was present (R. 56).

Then the defendant was subjected to a series of questioning which began at about 4 in the afternoon and did not end until about 9 or 9:30 in the evening (R. 108-9), during all of which time defendant never left the room, was not given any food or rest, and at about 8:30 in the evening defendant made certain statements to the effect that she put the poison in the cup of lemon juice and gave it to her husband to drink, after which she was held on a charge of murder in the first degree (R. 59).

During the course of such questioning the District Attorney, Patrick H. Fenton, told defendant that while he was in Europe he had killed five men and confessed to the authorities or he might have faced a firing squad (R. 84, 94, 106 & 133).

The record discloses that the petitioner was a person of limited education, having gone to school only to the seventh or eighth grade and that she was married between the age of 16 and 17 years (R. 85); that she had just attended the funeral and burial of her husband when she was taken directly from the cemetery to the Court House for questioning (R. 55); that the weather was extremely hot (R. 56); that she was in a hysterical frame of mind and sobbed and cried during the questioning (R. 80, 87 & 100); that she was taken in for questioning alone and was not represented by family, friends or legal counsel; that her father was in the Court House during the questioning and requested that she be given an attorney, but her father as well as her uncle were denied admission to the room where she was being questioned, and were told that there was an attorney in there to represent her (R. 79); that during the course of such interrogations the District Attorney told the defendant that he had been accused of killing five men while he was in the Army in Europe and confessed to the authorities or he might have faced a firing squad, and that it would be better for her to confess (R. 84, 94 & 106). The District Attorney also read to the petitioner from the Utah Statutes, defining the crimes of manslaughter, murder, etc., and the prescribed penalties (R. 97-8-9, 101, 103-4, & 106-7).

The petitioner, after the alleged admission, requested legal counsel which request was entirely ignored (R. 59, 65-6). Next day a written confession was prepared by the Sheriff and handed to her for signing which she did (R. 64-5). At the trial of the action counsel for defendant objected to the admission of the written testimony and of the

testimony relating to the oral admissions for the reasons they were obtained in violation of the constitutional rights of the defendant (R. 88). The court ruled the written confession should not be admitted but made findings to the effect that there was no coercion, duress or promises of immunity or violation of the constitutional rights of defendant (R. 110-11-12).

The trial court instructed the jury under instruction #6 as follows:

"In this case there has been testimony that on two occasions the defendant was questioned or interviewed in the presence of the sheriff and other officers and that she made certain statements in answer to questions. Referring to such alleged statements, you are instructed to consider carefully *all the circumstances* including the events of the day and the experiences of the defendant during the day and days immediately preceding. You should consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution, or whether any assurance was given of any benefit or reward to the defendant if she made a statement. You should also consider the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear of hysteria on the part of the defendant during the time. After giving due consideration to all the surrounding circumstances, you should determine whether the alleged statements were made by the defendant, and if so, whether such statements or any of them are entitled to be believed and if so to what extent. You are the exclusive judges of the credibility of such statements and the weight to be given to them if you believe that any such statements were made" (R. 142). (Italics supplied.)

The witnesses, Patrick H. Fenton, John Walter Segler, Milda Hopkins Ashdown and William Henry Hopkins, testified before the Court in the absence of the jury (R. 77-108).

Summary of Argument

I.

Petitioner was taken in for questioning while in an emotional and irrational state, immediately after the funeral services of her deceased husband, and was subjected to a series of constant interrogation by the officers of Iron County, Utah, for a period of approximately 5½ hours, during which time petitioner did not have food or rest, was not properly advised of her constitutional rights, was denied her request for counsel, and her father and uncle were barred from the room in which she was being questioned although they requested admittance, and their request for legal counsel for her was denied and they were told she had an attorney who would represent her, when in truth and in fact such attorney was the District Attorney who was not representing petitioner, but the State of Utah. During the course of such interrogations the District Attorney told the petitioner that he had been accused of killing five men while he was in the Army and confessed to the authorities or he might have faced a firing squad, and that it would be better for her to confess.

The instant case presents the question whether petitioner was denied due process under the Fourteenth Amendment of the United States Constitution by the method and manner in which she was held and interrogated.

Petitioner made admissions after she had been interrogated for approximately 5½ hours, and the instant case presents the question of whether such admissions were

coerced and were not voluntary, due to the method and circumstances surrounding the interrogations.

II.

The admissions made by petitioner during such interrogation were admitted in evidence at her trial over the objection of her counsel. Such admissions constituted the vital and sole part of the State's case against her and resulted in her conviction. And the instant case presents the question of whether petitioner was denied due process under the Fourteenth and Fifth Amendments to the Constitution, by the admission of statements extracted from her under the circumstances demonstrating they were coerced and not voluntary.

III.

At petitioner's trial the court, in the absence of the jury, heard all of the evidence surrounding the method and manner in which petitioner was interrogated, prior to her admissions. All of this evidence was not presented to the jury, but the court in its instruction #6, instructed the jury they were to pass upon the weight and credibility of such statements after giving due consideration to all the surrounding circumstances, the attitude and conduct of the officers mentioned, their statements to the defendant, etc., which they could not do when the testimony of four of the witnesses in relation thereto was excluded from the jury.

This presents a further question that petitioner was denied due process.

ARGUMENT

I.

Petitioner was Denied Due Process of Law

(a) By the Method and Circumstances of the Examination by which the Admissions were Obtained.

In the instant case the state court by its decision held that no constitutional rights of petitioner had been violated, and that the oral confessions and admissions made by her under questioning prior to arrest and trial were voluntary within the meaning of constitutional provisions against self incrimination and properly admissible in evidence (R. 159).

Petitioner contends that the facts herein do not justify such a decision and are in direct conflict with the rulings of this Court, and that the method and circumstances surrounding the examination of petitioner prior to her arrest show that she was denied those fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment and the Self Incrimination and Due Process Clause of the Fifth Amendment.

This case is not about guilt. This case concerns itself with constitutional guarantees in a capital crime. Procedural due process of law, not the guilt of this petitioner, is relevant to the issue before this Court. In *Sacher v. United States*, 343 U.S. 1, at 23, 25, 28, Mr. Justice Frankfurter gives us warning, that:

"Bitter experience has sharpened our realization that a major test of a true democracy is the fair administration of justice.... (and) in the development of our liberty, insistence upon procedural regularity has been a large factor.'... It is not for nothing that most

of the provisions of our Bill of Rights are concerned with matters of procedure.

"... Time out of mind this Court has reversed conviction for the most heinous offenses, even though no doubt about the guilt of the defendant was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society."

No impartial reader of the trial record could agree that the petitioner fully understood her rights during the period she was held for questioning. She was in a tired and emotional state of mind having just come from the funeral and burial of her husband. It was an extremely hot day. She was a person of limited education. No member of her family was permitted to be in the room with her during such examination, although her father and uncle requested it. Her father and uncle were denied entrance to the room where she was being questioned and when they requested that she be given an attorney, they were misled by being told she had an attorney in there to represent her.

Furthermore there is a question as to whether petitioner was ever properly advised of her constitutional rights. The interrogators didn't bother to have a reporter or stenographer present during this questioning or make a tape recording and so there is no official record of just when or how the accused was advised of such rights, or whether she was in any condition to understand just what her rights were.¹

¹ Sheriff Nelson testified on direct examination that she was so advised *a few minutes* after the questioning began (R. 57) but on cross examination he said that at least *25 minutes or one-half hour* elapsed before petitioner was so advised (R. 69). A good many questions and a good many answers were undoubtedly made in this

In the case of *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, the right of counsel and the total attributes of a fair trial were defined by Mr. Justice Sutherland as follows:

period of time. It is stated that petitioner talked mostly during this time about family affairs, but the record shows that she was being questioned. (*Italics supplied.*)

Sheriff Nelson testified:

"Well, as I remember *when I started talking to her* I asked her if she had give it any more thought about where the poison might have come from that was pronounced that Ray had had or got. She said no, she didn't know anything any more about it than she did before. I don't know whether she used them very words or not, but she intimated, she said she didn't know any more about it. (*Italics supplied.*)

• • • • •

"... Well, I said to Mrs. Ashdown again, that the doctor still claimed that Ray had been poisoned and we would like to find out what had happened and asked her if there was any chance that she had made a mistake of any kind and put poison in that lemon juice and thought it was salt. And she said she didn't think so. I asked her if she knew of any poison that was around the premises of any kind.

"Q. Sheriff, prior to asking Mrs. Ashdown if she had made a mistake, was Mrs. Ashdown informed as to whether or not she needed to answer your questions?

"A. *I don't believe at that time. I believe it was a little later on when we advised her of her—when you advised her of her constitutional rights. I don't believe it was right on the start.*" (R. 56-7). (*Italics supplied.*)

But Sheriff Wells was very indefinite at what time the defendant was advised of such rights as per the following excerpt from his testimony on cross examination at R. 132:

"Q. Yes. And you kept Milda in there, the three of you, questioning her, reading the statutes to her and defining manslaughter and murder, and she wasn't even charged with murder, isn't that the truth?

A. There had been no charges made at that time.

Q. You didn't know what the charges would be, did you?

A. No, sir; I did not.

Q. Certainly. And now you come back and say he advised her of her constitutional rights, and today he was reading the statutes. Now, which was it?

A. *That was later on—*

Q. Oh.

(Continued on next page.)

"... Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

U.S. at p. 69. (Italics supplied.)

This case further establishes that the right to counsel in state capital cases means that the assistance of counsel must be effective and not a mere sham and that petitioner was entitled to effective counsel at the trial. But in the case at bar the question is how could petitioner ever have effective counsel at the trial, no matter how skilled, in view of what went on before trial. She was denied effective counsel at the trial itself because of what went on before trial while

A. He advised her of her constitutional rights.

Q. That was later on.

A. I think—

Q. Do you know what time that was?

A. No.

Q. How many hours?

A. I don't recollect the time, no, sir.

Q. How many hours?

A. I wouldn't say.

Q. Two?

A. I wouldn't say that.

Q. Be three?

A. I wouldn't say that.

Q. Couldn't you guess at that, like you could the two minutes?

A. No. There was too much conversation, and too many questions." (Italics supplied.)

she was held and questioned without counsel, without an understanding of her legal rights, without family or friends and absolutely under the control of the prosecution. You might say she was in fact tried and convicted during such questioning because it sealed her fate at the trial.²

The father and uncle of petitioner felt that petitioner needed aid of counsel and wanted to be admitted to the Courtroom where she was being questioned and to get an attorney for her, but they were denied admittance and were misled by being told there was an attorney in there to represent her (R. 79).

Such a procedure is the very essence of unfairness, the taking advantage of a weary, emotional and hysterical woman of a limited education, and is the very situation our founding fathers wished to guard against when they passed those laws which insure fundamental human rights of life and liberty, and insure a fair trial to all accuseds.

Excerpts from the record are set forth to substantiate the above circumstances and to show that the alleged statements of confession made by her were the product of sustained questioning and pressure and that her constitutional rights against self incrimination and due process were flagrantly violated:

² Associate Justice Rutledge pointed out in the case of *Wood v. United States*, 128 F.2d, 265 at 271, decided in 1942, that the right to counsel includes aid in the preparation of the case, and the aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial. He wrote at 128 F.2d, page 277: "(18) The fairer practice, and, we think, the only one consistent with the court's position, would advise the accused in all cases, before permitting him to speak even as a volunteer, of his right to counsel and would warn him that he need not speak and, if he does, it is at his peril."

(a) *That Petitioner was a person of limited education:*

William Henry Hopkins on direct examination:

“Q. How much of an education did she have?

A. Very little education. . . . She probably passed the seventh or eighth grade. . . . She was between sixteen and seventeen years of age when she was married. Just a child like” (R. 85).

(b) *That Petitioner was taken in for questioning directly after the funeral and burial of her husband.*

Sheriff Arthur Nelson on direct examination:

“A. I asked to have her come up. I went out to the cemetery and the funeral was just over and they were ready to leave and I contacted her brother-in-law. . . . Stewart had Mrs. Ashdown in his car, he was a son-in-law of Mrs. Ashdown, and I asked him if he would ask Stewart to bring Mrs. Ashdown by the County and City Building, we would like to talk to her. So Alf brought word back to me that he would go that way and take Mrs. Ashdown to the City and County Building” (R. 55).

(c) *The weather was extremely hot.*

Sheriff Arthur Nelson on direct examination:

“A. Well they were complaining about it being hot and it was hot so we served them a glass of lemonade, and then I asked Mrs. Ashdown if we could talk to her alone in the courtroom. And so we went into the courtroom and talked with her” (R. 56).

- (d) *No member of her family was permitted to be in the room with her during such examination, although her father and uncle requested it:*

Sheriff Arthur Nelson on direct examination:

"Q. Was Mr. Arch Benson, another deputy sheriff present during this conversation?

A. No, he was out in the hallway sort of taking care of the door; there was people trying to come in and out and we tried to keep everyone out of the courtroom" (R. 56).

Charles Wells on examination by the court:

"Q. Did he say he would like to talk to her alone?

A. Yes, sir.

Q. Her sister was with her at that time?

A. Her sister was in the Sheriff's Office at the time, yes, sir" (R. 102).

Walter Segler on direct examination:

"A. Well, when they entered the door at the foot of the stairs this Mr. Benson was at the foot of the steps and didn't figure on anybody entering there" (R. 78).

Mr. Segler, continuing: on direct examination:

"Q. Who was with you?

A. Well, Mr. Hopkins, her father. . . . And I says I am her uncle and this is her father. And I says I don't think she has got a right to be questioned without her father's presence or some attorney.

Q. What happened?

A. And I said I would like to go to the sheriff's office. He never resisted, but we walked up the stairs and when we got to the top of the stairs there was another, either marshal or, I wouldn't be sure, but I believe it was Hoyt, I am not sure, a city marshal, I think. Of course I am not familiar with these names, I just since this came up got acquainted with them" (R. 78-9).

Mr. Segler continuing on direct examination:

"A. I told them I thought that Mr. Hopkins, her father, or some attorney should be in her presence. And they refused to let either one of us go in" (R. 79).

William Hopkins on direct examination:

• • • • •
 "A. I remember, if my memory serves me rightly, I appeared there between four and five o'clock and went immediately into the sheriff's office; and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me *like a fair, square deal, to railroad that girl into the sheriff's office without counsel or friends of any description.*

Q. What was the answer to that?

A. Well, if I remember right, I believe Mr. Benson related that she was under suspicion. And if I remember right I believe I told him that we was very sorry, that we had no—that was the first information I had to that effect that she was even under suspicion, and he informed me that she was under suspicion" (R. 85).
 (Italics supplied.)

- (e) *Petitioner did not have benefit of counsel during such examination although she requested it and her father and uncle requested it.*

Sheriff Nelson on direct examination:

“... At that point she said ‘I had ought to have an attorney.’ ‘Well,’ I said ‘you have told us about everything now except the strychnine.’ I says, ‘Tell us where you got the strychnine and we can clear it up and get this over with’” (R. 59).

Sheriff Nelson on examination by the Court:

“A. She said ‘I had ought to have an attorney.’ That is the way she put it.

The Court: And then what was said?

A. Well, I told her, I said ‘Well, you told us about everything now except where you got the strychnine.’ I says ‘*It is a little late to get an attorney.*’

The Court: What did she say then?

A. She didn’t ask any more for an attorney. She never mentioned it any more” (R. 65). (*Italics supplied.*)

Sheriff Nelson on cross examination:

“Q. Now, you stated to the court that after she asked for counsel she had confessed everything but where she got the strychnine, is that correct?

A. Yes, that is right.

Q. And you felt, like you told the court, there was no need for doing that, just as well get it over with.

A. Yes, that is the way I felt about it.

Q. You didn’t heed to her request, then did you?

A. No, we didn’t” (R. 66).

Sheriff Nelson further on cross examination:

"Q. Now, how many times, sheriff, did that girl ask for counsel, one, two or three times?

A. I heard her ask the one time.

Q. Why didn't you give it to her, sheriff?

A. Well, she had told us about everything then"
(R. 73).

John Walter Segler on direct examination:

"A. Well, I says, it isn't fair to take that girl up there and question her without her father's presence or an attorney.

A. And I says, I am her uncle and this is her father. And I says, '*I don't think she has got a right to be questioned without her father's presence or some attorney*'"
(R. 78-9). (Italics supplied.)

John Walter Segler further on direct examination:

"A. And then I told them up there again that I was her uncle, and I didn't think they had a right to take her in and question her, and one of the officers, I don't know which one it was spoke up and says, '*Why she's got an attorney in there to defend her.*' He says 'to give her constitutional rights.' I says, 'Is he her attorney, or who?' I says, 'I didn't know anything about it until this time'" (R. 79). (Italics supplied.)

John Walter Segler on cross examination:

"A. Well, I am not sure, but it seems to me like it was Mr. Benson, it was one of them, like I said I wasn't

acquainted with the men, didn't know them at the time, *but they said she has got an attorney in there to advise her, and so they didn't want to let us in, because I said that I figured she needed her father's presence or an attorney. And they said 'Why she's got an attorney in there to advise her.'* And that is the only answer we got, in regard to that" (R. 81). (Italics supplied.)

William Henry Hopkins on direct examination:

• • • • •
 "A. . . . and there we contacted Mr. Benson, Sheriff Miller and Sheriff Bybee, and as I remember it right, I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description. . . .

Q. Did you ask for counsel then?

A. Yes. I said 'I believe that she should have an attorney in there.' And I made the remark that I intended to employ you as an attorney" (R. 85).

William Henry Hopkins on redirect examination:

• • • • •
 "A. Yes, I told them when I first went in there I thought that that was wrong for them to take her in there and quiz her and railroad her" (R. 86).

Sheriff Wells on cross examination:

• • • • •
 "Q. Now, you said she did ask for counsel. Was there anyone that spoke up and said you can get him, we will go get him for you now? . . .

A. I think in answering that—

Q. Just answer that.

A. She did ask for counsel.

Q. And she didn't get counsel.

A. Not at that time, no, sir.

Q. Did she ever tell you, 'I don't want counsel?'

A. No, that statement was never made to me" (R. 100-1).

(f) *Petitioner was in an hysterical and emotional condition during the questioning.*

After petitioner made the alleged oral admissions in the evening of July 9th, she was placed under arrest but she wasn't asked to sign any written statement until the next day on the 10th. To show that petitioner was hysterical and not in a calm or unexcited state and didn't understand what she was doing on July 9th when the questioning took place, the following is quoted from the record:

Sheriff Nelson on examination by the Court:

• • • • •

"The Court: Sheriff, why did you wait until the afternoon of the 10th before offering this to Mrs. Ashdown, to sign?

A. Well, we didn't take any written statement on the 9th. We thought we would talk to her on the 10th, *she would be calm and wouldn't be excited and she would know what she was doing.* We didn't want to feel like taking advantage of her" (R. 65). (Italics supplied.)

John Walter Segler on direct examination:

• • • • •

"A. And at that time I heard her crying and carrying on in there.

Q. How long did you hear her crying?

A. A couple of times when I was in the hall; and I don't know how long.

Q. And you were there in the hall how long would you say, how many hours?

A. Well, in the Sheriff's office and thereabout and back and forth to Mrs. Ashdown's place, I would say we was there approximately two and a half hours, or such a matter" (R. 80).

William Henry Hopkins on redirect examination:

"Q. Could you hear Mildred crying?

A. I could. Crying and moaning.

Q. All the time you were there?

A. Well, at intervals, most of the time, yes" (R. 87).

Sheriff Wells on cross examination:

• • • • •

"Q. Was she crying?

A. She would sob and cry at times, yes sir" (R. 100).

(g) *Petitioner was questioned and kept in the Court Room from 4 P.M. until 9:30 P.M. without food or rest:*

Sheriff Nelson on direct examination:

• • • • •

"Q. Will you tell us the time of day that conversation took place?

A. As near as I can remember it was about four o'clock" (R. 54).

Sheriff Wells on examination by the Court:

• • • • •

"The Court: Did she leave the room at any time during the period from when she first went into the court-room until she left in the evening?

A. No sir.

The Court: Was she offered the opportunity to leave the room at any time?

A. I don't think that I remember of a request being made or the offer being made at any time, Judge.

The Court: What time was it that she actually did leave the courtroom?

A. That was possibly, I would say, between 9:30 and a quarter to ten.

The Court: Did you notice the time? When you say possibly that doesn't help us.

A. I came out of the courtroom at 9:30, yes, sir. I noticed the time" (R. 96).

Sheriff Wells on cross examination:

"Q. Did you offer anything, any food, didn't you say 'Will you have lunch? Will you eat?' Did you say that?

A. You mean after four o'clock?

Q. Yes.

A. No" (R. 100).

Sheriff Nelson on direct examination:

"Q. Was anything said to Mrs. Ashdown that she was free to leave the courtroom if she cared to?

A. By George, I don't remember about that" (R. 57).

John Walter Segler on direct examination:

"A. . . . But before that, when Mr. Wells come out he says, 'Well' he says, 'it has been six and a half hours in this'" (R. 81).

- (h) *Petitioner's oral confession was not voluntary and the following excerpts from the record show that it wasn't and that inducements were made:*

Sheriff Nelson on direct examination:

• • • • •
 "A. Well, I said to Mrs. Ashdown again, that the doctor still claimed that Ray had been poisoned and we would like to find out what had happened and asked her if there was any chance she had made a mistake of any kind and put poison in that lemon juice and thought it was salt. . . ." (R. 56).

Sheriff Nelson on direct examination:

• • • • •
 "A. Well, then I asked Mrs. Ashdown again, I says, 'No,' I says, 'Think and see if there has been a chance that there has been a mistake made, any kind of a mistake made' I says 'we should know about it *and we could iron it out*' " (R. 58). (Italics supplied.)

Sheriff Nelson on direct examination:

"... And I think I asked her about the same thing over again, that *somebody* must have put some poison in the cup because Ray was pronounced being poisoned. . . ." (R. 59). (Italics supplied.)

Sheriff Nelson on direct examination:

"... Why don't you tell us the truth about that poison and how it got in the cup. I says 'Tell us the truth about it so as we can clear this thing up.' She started crying and said 'I will never see my children any more.' And I says, 'Yes, you would see your children again, Mrs. Ashdown.' I says, 'Your children will be taken care of.'

I says, '*Just tell us who put the poison in the cup.*'
 . . ." (R. 59). (Italics supplied.)

Sheriff Nelson on cross examination:

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"Q. Then I asked you at the hearing, to impress it very much, at that time I will ask you did not Patrick Fenton, the district attorney, in your presence and in the presence of Mr. Welsh, say 'I killed five men while I was in the Army and it is better to confess, I got off. If I hadn't done that' and you studied and you studied, and you said you didn't hear that statement. . . . You know now it was said.

A. Yes, I know there was something to that effect, now, yes" (R. 70).

Milda Hopkins Ashdown, on direct examination:

"Q. Milda, will you tell the court when you were being examined by the officers what Pat Fenton told you in reference to killing those men?

A. Well, he said '*if you will tell us what happened why it will go a lot easier on you.*' He said, '*I confessed and it was a lot easier on me, if I hadn't confessed I might not have gotten off, I might have been facing the firing squad now*'" (R. '84). (Italics supplied.)

Sheriff Wells on direct examination:

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"A. Sheriff Nelson asked her if there couldn't have been some mistake of when this liquid was taken by her husband. He asked her if she couldn't have made a mistake by putting something in the liquid besides salt. Her answer was no.

Q. Was that subject dwelled on at any great length, Mr. Wells?

A. Yes, sir. *That question was asked her, to the best of my recollection fifteen or twenty times*" (R. 91). (Italics supplied.)

Sheriff Wells on further direct examination:

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"A. Mr. Nelson at that time asked Mrs. Ashdown, and I think the statement was made this way: He says, *'Mrs. Ashdown, you know that Ray did not mix the poisoning and take it his self'*" (R. 93). (Italics supplied.)

Sheriff Wells on further direct examination:

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"A. Mr. Fenton made the statement as I recall being in quite a predicament at one time his self; that he was accused of killing four men and through the cooperation of the investigating officers and by telling the truth the investigating officers was of much value to him and possibly had saved him from the firing squad" (R. 94).

Sheriff Wells on examination by the Court:

"The Court: Can you tell me how it came about that Mr. Fenton read those statutes relating to murder or manslaughter and what was said before he came to reading those statutes?

A. At that time, your Honor, I think that she was asked if a mistake could have been made, at the time that this lemon juice was mixed, and if there had been a mistake made, I think Mr. Fenton, as I understood it, described the different penalties, in case that there would have been a prosecution.

Q. And what did she say?

A. As I remember it he read the statutes to her and told her the difference, that if a prosecution, a complaint was issued against her, of what the difference of the complaint would be.

Q. Was there anything said about it would be better for her to tell what happened at that time?

A. I think she was told at that time that if there had been a mistake made, that in case of prosecution it would be a lesser degree, the crime" (R. 101).

Patrick H. Fenton, on examination by the Court:

"A. Yes, your Honor. Mrs. Ashdown had been asked by the sheriff several times if there was any possibility of an accident in connection with this matter, if she might possibly have got hold of some poison and put it in the lemon juice thinking it was salt. And at one point during the phase of the conversation I told Mrs. Ashdown that at one time in Europe I had been accused of killing five men and that I had told the investigating officers of what had happened, and that they had helped and in effect cleared me of the charges, and that if it was an accident she might wish to tell the investigating officers what had happened. That is the conversation as nearly as I can remember it, your Honor" (R. 106).

Sheriff Wells on cross examination:

"A. Mr. Fenton at that time told Mrs. Ashdown that he had an experience and was charged at that time with killing four men, I think, in Europe, and he had co-operated with the investigators who was investigating the case and they were the ones that had helped to clear him" (R. 133).

Sheriff Nelson on direct examination:

“A. I told Mrs. Ashdown, I says, ‘Is there any chance, possible chance, that there has been a mistake made, accidentally or any other way?’ And I says, ‘If there has, I wish we knew about it. . . .’ ‘Well,’ I says, ‘Someone must know something about it. . . .’” (R. 117).

Sheriff Nelson further on direct examination:

“... And I says, *someone* had to—*someone* had to put the poison in that lemon juice, it is pronounced poison. . . .” (R. 118). (Italics supplied.)

Sheriff Nelson further on direct examination:

“... Finally I said to Mrs. Ashdown, I said, ‘Mrs. Ashdown, I don’t believe that Ray put that poison in that juice.’ I said, ‘Why don’t you tell us the truth about that poison and who put it in?’ She says ‘I’ll never see my children any more.’ ‘Yes,’ I says ‘*You’ll see your children again, that will be taken care of*’” (R. 118-9). (Italics supplied.)

Sheriff Wells on cross examination:

“A. Mr. Nelson at that time asked Mrs. Ashdown, he told Mrs. Ashdown that he didn’t believe that that was the truth, that he didn’t think that Ray had mixed the strychnine in the lemon juice; therefore, he asked Mrs. Ashdown to tell him the truth about who put the strychnine in the lemon juice. . . .” (R. 127).

(i) *Petitioner was asked the same questions over and over:*

Sheriff Nelson on direct examination:

"... And I think I asked her about the same thing over again that somebody must have put some poison in the cup because Ray was pronounced being poisoned. . . ."
(R. 59).

Sheriff Wells on direct examination:

"A. Sheriff Nelson asked her if there couldn't have been some mistake of when this liquid was taken by her husband. He asked her if she couldn't have made a mistake by putting something in the liquid besides salt. Her answer was no.

Q. Was that subject dwelled on at any great length, Mr. Wells?

A. Yes, sir. That question was asked her, to the best of my recollection *fifteen or twenty times*" (R. 91).
(Italics supplied.)

(j) *At the beginning of the questioning before petitioner had been charged with any crime or advised of her constitutional rights, the District Attorney read the statutes relating to manslaughter and murder to petitioner as though petitioner was guilty of one or the other charge:*

Patrick H. Fenton, District Attorney, on examination by the Court:

"Q. Now, in relation to this matter of reading the statutes as testified to by Deputy Wells, will you state what was said preliminary to the reading of those statutes?

A. Yes, your Honor. It was in line with the same phase of questioning concerning possibility of an accident; and I either got the statute or asked one of the officers to get it, I am not sure which, it was brought in at my request or else I went and got it, and it was explained to Mrs. Ashdown—

Q. Just a moment—

A. All right. Or told Mrs. Ashdown—

Q. Say who said what.

A. Yes. I told Mrs. Ashdown that as I saw the matter there was a possibility of either first degree murder or involuntary manslaughter, if she had done it, and that the penalty for involuntary manslaughter was up to one year in the county jail; and that the penalty for first degree murder was, with a recommendation of leniency from the jury, either death or life imprisonment and without that recommendation a mandatory death penalty and then I read the statutes covering those particular subjects. The only conversation was first degree murder and involuntary manslaughter; there was nothing said about second degree murder or voluntary manslaughter" (R. 106-7).

Sheriff Wells on examination by the Court:

"A. As I remember it he read the statutes to her and told her the difference, that if a prosecution, a complaint was issued against her, of what the difference of the complaints would be" (R. 101).

Sheriff Wells on cross examination:

"Q. Yes. And you kept Milda in there, the three of you, questioning her, reading the statutes to her and

defining manslaughter and murder, and she wasn't even charged with murder, isn't that the truth?

A. There had been no charges made at that time.

Q. You didn't know what the charges would be, did you?

A. No, sir; I did not" (R. 132).

Patrick H. Fenton, District Attorney on cross examination:

"Q. I will ask you, Mr. Fenton, this, you told her that manslaughter was one year in the county jail?

A. Involuntary manslaughter.

Q. Involuntary manslaughter. Did you explain the two degrees of manslaughter?

A. I explained that there were two degrees, *but that in my opinion this was either involuntary manslaughter or first degree murder* as she was charged with it.

Q. Did you tell her that she was charged—

A. No.

Q. —going to be charged with that?

A. No.

Q. You were not telling her what her charge would be, you were just relating your own case—

A. No.

Q. Is that right?

A. No, not correct.

Q. Well, I just wanted what you told her.

A. The statement was made in connection with consideration of this specific matter.

Q. Yes.

A. *And at that time the lady had not been charged.*

Q. Or you didn't tell her what she was going to be charged with?

A. That is correct, *no one knew what she was going to be charged with*" (R. 107-8). (Italics supplied.)

This then is the record speaking and establishing the method and mode of petitioner's examination.

The state court in its opinion says, "... The questioning was carried on by men whom she knew and who permitted her to discuss at will her family affairs much of the time. Under these circumstances we do not feel that questioned for a period of 5½ hours would tend to break her will or induce her to confess to a crime which she did not commit" (R. 155).

Although the questioning was by people she knew, still all of those people were in authority. And these people in authority had kept telling her it would be better for her to tell the truth. The district attorney had told how he had confessed to killing five men in Europe or might have faced a firing squad and that it would be better for her to confess, and the sheriff had promised her that if she would tell the truth she would see her children again and they would be taken care of. It would be impossible to measure the force of the influence thereby exerted against the petitioner in her worn, weary and emotional condition and to what extent they entered into her decision to confess.

On the question of when a confession is voluntary, there is much authority.³

³ The United States Supreme Court passed on the matter in *Bram v. United States*, 168 U.S. 532, 533, 18 S.Ct. 183, 192, 42 L.Ed. 568, where the court reviewed both English and American decisions on the subject. It is there said:

"... While all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases."

Going on, the Court reviews American authorities:

"In the following cases the language in each mentioned was held to be an inducement sufficient to exclude a confession or

Statements elicited from the accused after prolonged detention and pressure, can be looked upon with grave sus-

statement made in consequence thereof. In *Kelly v. State* (1882), 72 Ala. 244, saying to the prisoner: 'You have got your foot in it, and somebody else was with you. Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth'. In *People v. Barrie*, 49 Cal. 342, saying to the accused: 'It will be better for you to make a full disclosure.' In *People v. Thompson* (1890), 84 Cal. 598, 605, 24 P. 384, 386, saying to the accused: 'I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way.' In *Beery v. United States* (1893), 2 Colo. 186, 188, 203, advising the prisoner to make full restitution and saying: 'if you do so, it will go easy with you. It will be better for you to confess. The door of mercy is open, and that of justice closed;' and threatening to arrest the accused and expose his family if he did not confess. In *State v. Bostick* (1845), 4 Har., Del., 563, saying to one suspected of crime: 'The suspicion is general against you, and you had as well tell all about it. The prosecution will be no greater. I don't expect to do anything with you; I am going to send you home to your mother.' In *Green v. State* (1891), 88 Ga. 516, 15 S.E. 10 (30 Am. St. Rep. 167) saying to the accused: 'Edmund, if you know anything, it may be best for you to tell it;' or, 'Edmund, if you know anything, go and tell it, and it may be best for you.' In *Rector v. Commonwealth* (1882), 80 Ky. 468, saying to the prisoner in a case of larceny: 'It will go better with you to tell where the money is. All I want is my money, and if you will tell me where it is, I will not prosecute you hard.' In *Biscoe v. State* (1887), 67 Md. 6, 8 A. 571, saying to the accused: 'It will be better for you to tell the truth, and have no more trouble about it.' In *Com. v. Nott* (1883), 135 Mass. 269, saying to the accused: 'You had better own up. I was in the place when you took it. We have got you down fine. This is not the first you have faken. We have got other things against you nearly as good as this.' In *Com. v. Myers* (1894), 160 Mass. 530, 36 N.E. 481, saying to the accused: 'You had better tell the truth.' In *People v. Wolcott* (1883), 51 Mich. 612, 17 N.W. 78, saying to the accused: 'It will be better for you to confess.' In *Territory v. Underwood* (1888), 8 Mont. 131, 19 P. 398, saying to the prisoner that it would be better to tell the prosecuting witness all about it, and that the officer thought

picion.' If the petitioner had wished to confess, she would have done so at the beginning, but her prolonged refusal to do so, even in the presence of people she knew casts a grave doubt that such statements were willingly made by her. The presence of all of these officers and the district attorney repeatedly asking her questions in her confused state of mind; the reading of the statutes of the different crimes by the district attorney and his statement to her that he had

the prosecuting witness would withdraw the prosecution, or make it as light as possible. In *State v. York* (1858), 37 N.H. 175, saying to one under arrest immediately before a confession: 'If you are guilty, you had better own it.' In *People v. Phillips* (1870), 42 N.Y. 200, saying to the prisoner: 'The best you can do is to own up. It will be better for you.' In *State v. Whitfield* (1874), 70 N.C. 356, saying to the accused: 'I believe you are guilty. If you are, you had better say so. If you are not, you had better say that.' In *State v. Drake* (1893), 113 N.C. 624, 18 S.E. 166, saying to the prisoner: 'If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you.' In *Vaughan v. Com.* (1867), 17 Gratt. Va., 576, saying to the accused: 'You had as well tell all about it'."

' In a case of long protracted questioning of a Chinese, in the absence of an interpreter, friends or counsel; *People v. Quan Gim Gow*, 23 Cal. App. 507, 138 P. 918, 919, the court said:

"While no physical force was used, and neither threats nor promises made, there can be no doubt at all but that the repeated questioning of the officers, like the constant dropping of water upon a rock finally wore through his mental resolution of silence. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When, then, did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection; for his inquisitors allowed him none. The examination was persisted until a response was forthcoming, and, under the circumstances, it must be said that the responses appear to have been unwillingly made and as a direct result of continued importuning. . . . The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character. . . ." 138 P. at page 919. (Italics supplied.)

been accused of killing five men and might have faced the firing squad except for his confession to the authorities and that it would be easier on her to confess; the repeated statement of the officers that they did not believe Ray put the poison in the lemon juice and urging petitioner to tell who did, etc., finally brought about the expected response from a weary, grief stricken and overborne woman. *Wigmore*, in discussing the considerations that justify the privilege against self incriminations, points out:

"The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself morally suffer thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse: ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." (Italics supplied.)

8 *Wigmore on Evidence* (3rd Ed.) ¶2251, p. 309.

And after 5½ hours of such persistent questioning in the instant case, Sheriff Nelson said:

... I don't believe that Ray put that poison in that cup. Why don't you tell us the truth about that poison and

how it got in the cup. I says, 'Tell us the truth about it so as we can clear this thing up. . . .' (R. 59).

He was pressuring her for an answer—the expected answer. The Sheriff continues:

"... She started crying and said 'I will never see my children any more.' And I says, 'Yes, you would see your children again, Mrs. Ashdown.' I says, 'who put the poison in the cup.' . . ." (R. 59).

And so after 5½ hours of persistent questioning he got the expected answer. She told the sheriff then that she put it in (R. 59).

The record is most clear that petitioner was never afforded the protection of our constitutional guarantees by the manner in which this questioning was carried on. Petitioner was in no condition to have been questioned let alone being taken into the court room (the fact that this questioning took place in the court room was a further means of exerting pressure as it may have led the petitioner to believe she was in fact being tried) and being subjected to a prolonged ordeal, and the statements so made by her were not free and voluntary but were the result of duress, intimidation, sustained pressure and inducements by the officers of Iron County as detailed and enumerated herein. Her right to a fair trial was entirely disregarded in violation of due process of law and the lower court committed gross error in ruling otherwise. Her confession was a result of what her interrogators wanted her to say, not what she wanted to say, it being plainly shown that the District Attorney had concluded she was guilty before she had spoken, and thus read the statutes and penalties of manslaughter and murder to her as he had concluded that she was guilty of one or the other (R. 107-8).

II.

Petitioner was Denied Due Process of Law

- (b) By the Admission into Evidence of the Statements Extracted from her under Circumstances Demonstrating such Statements were Coerced and not Voluntary.

The admission and use of the oral confession obtained under the circumstances as disclosed by the record in this case denied petitioner due process of law.

Prior decisions of this Court have settled that when the pressure to confess, whether physical or mental, exerted against a defendant is so great that it wears away the defendant's resistance, a resulting confession is involuntary and its use deprives the defendant of due process of law.⁵

In *Ashcraft v. Tennessee*, 322 U.S. 143, 455, this Court speaking through Mr. Justice Black, says:

"The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an un-

⁵ In *Watts v. Indiana*, 338 U.S. 49, 53, 49 S.Ct. 1347, 1350, Mr. Justice Frankfurter said:

"A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary." 338 U.S. at page 53.

restrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." 322 U.S. at p. 155.

Also this Court speaking through Mr. Justice Frankfurter said in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, at p. 173 of 342 U.S.:

"... Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. . . ."

When petitioner in the instant case was taken in for questioning she was in no condition to be questioned having come directly from the cemetery after having attended the funeral and burial of her husband and being in an emotional and grief stricken state. She was exhausted and the weather was extremely hot, and without being given any food or rest she was subjected to a prolonged ordeal of questioning in the court room of the court house for 5 1/2 hours, without family, friends or an attorney being present, and those members of her family who wanted to be in her presence and aid her, were barred from so doing.

The circumstances surrounding the confessions which are to be reviewed; *Leyra v. Denno*, 347 U.S. 556, 558 (1954), must include the physical, emotional and mental condition of the defendant at the time of the arrest; this is essential

in order to apply the test of *Stein v. People of State of New York*, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522, in which the Court said:

"The limits in any case depend upon a weighting of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." 346 U.S. at page 185, 73 S.Ct. at page 1093.

In a recent case decided by the United States Supreme Court, *Fikes v. State of Alabama* (1957), 352 U.S. 191, 77 S.Ct. 281, the Court held:

"Where uneducated Negro of low mentality if not mentally ill, was removed after arrest to a state prison far from his home, without being taken before magistrate as required by Alabama statute, and kept in isolation except for sessions of questioning lasting several hours at a time and his father and a lawyer were prevented from seeing him, confessions thus obtained were not 'voluntary' and their use was a denial of due process, notwithstanding absence of physical brutality or excessive continuous interrogation."

The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment.*

* See, e.g., *Broien v. State of Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *Chambers v. State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; *Lisnuba v. People of State of California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166; *Ashcraft v. State of Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; *Malinski v. People of State of New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; *Haley v. State of Ohio*, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224; *Watts v. State of Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93

III.

Petitioner was Denied Due Process of Law

- (c) Because the jury under the court's instruction #6 was asked to pass upon the weight and credibility to be given the testimony concerning such oral admissions, upon their consideration of all of the circumstances relating thereto, when the testimony of four of the witnesses in relation thereto was not given in the presence of the jury.

The state court has ruled that instruction #6 was properly given in allowing the jury to weigh the circumstances surrounding the giving of the confession and determining not the admissibility of the confession but rather the credibility of the confession as evidence (R. 160).

The jury was instructed by the court under instruction #6 to consider carefully all the circumstances including the events of the day and the experiences of the defendant during the day and days immediately preceding and to consider the attitude and conduct of the officers mentioned, their statements to the defendant, and whether any threats were made or any promises, either express or implied, of immunity from prosecution or whether any assurance was given of any benefit or reward to the defendant if she made a statement, the length of time covered by the questioning and whether the circumstances show any coercion or compulsion or any physical or mental strain or suffering or fear of hysteria on the part of the defendant during the

1 L.Ed. 1801; *Stroble v. State of California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872; *Stein v. People of State of New York*, 346 U.S. 156, 73 S.Ct. 1077.

The above cases illustrate the settled view of this Court that coerced confessions cannot be admitted as evidence in criminal trials.

time, and after giving due consideration to *all* the surrounding circumstances the jury was asked to determine whether the alleged statements were made by defendant and were entitled to be believed. (See Instruction #6, R. 142.) (*Italics supplied.*)

The state court cites the language of the majority opinion in the case of *State v. Crank*, 105 Utah 332, 142 P. 2d 178, in which it was stated:

"... We agree with the rule approved in those cases, that a confession is not admissible in evidence unless it was voluntarily made; that this question must be determined by the court from all of the evidence from both sides bearing thereon; that if the court is satisfied from the evidence that the confession was voluntary, then the court admits the confession in evidence to the jury, *together with all of the evidence on the question of whether it was voluntary, and from such evidence the jury must determine the weight and credibility to be given it, but may not determine its competency as evidence, that being a question for the court.*" 105 Utah at page 373, 142 P. 2d at page 196. (*Italics supplied.*)

The jury in the instant case then did not have before it all of the evidence on the question of whether the confession was voluntary and the circumstances surrounding its being made, because the testimony of Patrick H. Fenton, the district attorney, John Walter Segler, Milda Hopkins Ashdown and William Henry Hopkins was not submitted to the jury. This testimony was given in the absence of the jury and before the court only. The jury did not hear the testimony of Patrick H. Fenton as to the statement made by him to defendant that he had killed five men in Europe and confessed, they did not hear the testimony of John Walter

Segler, an uncle of the accused, who testified that he protested the "railroading" of that girl, and requested that she be given an attorney and that he was kept out of the room in which she was being questioned and told she had an attorney, or of her father, William Henry Hopkins who testified to the same thing, and the testimony of Milda Hopkins Ashdown herself, who testified that Pat Fenton, the district attorney, had told her he killed five men while in the Service and confessed or might have faced a firing squad and that it would be better for her to confess.

It was the duty of the court to recall all of these witnesses and submit all of this evidence to the jury before instructing them to pass upon and determine the weight and credibility to be given the admissions of petitioner.

Such exclusion of testimony from the jury denied petitioner a fair trial and due process of law.

CONCLUSION

For the reasons stated above, the decision below should be reversed and the cause remanded to the court below with appropriate instructions.

Respectfully submitted,

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by Appointment by this Court.